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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Regional Director of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on January 12, 1962, reversing an order of the District Court for the Southern District of New York denying a temporary injunction against the holding of a Board representation election on respondent's vessels.

OPINIONS BELOW

Neither the opinion of the court of appeals (App. B, *infra*, pp. 20–49) nor that of the district court (App. B, *infra*, pp. 50–57) is yet reported. The Board's Decision and Direction of Election (App. C., *infra*, pp. 58–70) are reported at 134 NLRB No. 25.

JURISDICTION

The judgment of the court below was entered on January 12, 1962 (App. B, *infra*, pp. 20, 49). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED [1]

Whether the National Labor Relations Act extends to seagoing vessels which—

(1) are beneficially owned by, and operated under control of, an American corporation,

(2) are engaged almost exclusively in regular sailings in foreign commerce between the United States and Latin American ports,

(3) fly the flag of a foreign nation,

(4) carry a foreign crew, and

(5) have substantial and significant contacts with both the United States and the foreign nation.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, *et seq.*), and of the other relevant statutes and treaties, are set forth in Appendix A, *infra*, pp. 14–19.

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING GIVING RISE TO THIS SUIT

On November 13, 1959, the National Maritime Union of America, AFL–CIO ("NMU"), filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations

[1] See, also, note 14, *infra*, p. 13.

Act seeking certification as the representative of a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels owned by respondent, Empresa Hondurena de Vapores, S.A. ("Empresa"), a Honduran corporation. The petition was filed against United Fruit Company ("UFCO"), an American corporation, of which Empresa is a wholly owned and controlled subsidiary. Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran union which currently represents the employees aboard the vessels, was invited to intervene in the proceedings, but declined to do so or otherwise to participate therein. However, Sindicato Martimo Nacional de Honduras ("Sindicato"), another Honduran union, did intervene and participate. UFCO, together with Empresa (which intervened in the proceedings), contested the Board's jurisdiction on the ground that the Act does not apply to ships flying the flag of a foreign nation (App. C, *infra*, pp. 58–59).[2]

This was one of four cases[3] in which the Board considered the question of its jurisdiction over vessels flying the flags of other nations but operating almost exclusively in commerce between the United States and

[2] The facts set forth herein are based upon the district court complaint (which the Board moved to dismiss, see *infra*, p. 6) and the exhibits attached thereto. Exhibit 1 to the complaint contains the underlying Board decision and Direction of Election, which has been reprinted in Appendix C, *infra*, pp. 58–70.

[3] The other cases were *West India Fruit and Steamship Co., Inc.*, 130 N.L.R.B. 343; *Peninsular and Occidental Steamship Co.*, 132 N.L.R.B. No. 1; *Eastern Shipping Corp.*, 132 N.L.R.B. No. 72.

foreign nations. On February 16, 1961, the Board issued its decision in *West India Fruit and Steamship Company, Inc.*, 130 N.L.R.B. 343, the leading case of the group. It held that, where such a vessel has extensive contacts with this country, its operation affects commerce within the meaning of the Act; and that the Board has jurisdiction to remedy unfair labor practices committed on such vessel.

On November 17, 1961, the Board issued its Decision and Direction of Election in the instant case (App. C, *infra*, pp. 58–70). The Board found that the vessels involved were owned by Empresa, a Honduran corporation; that they were registered under the laws, and flew the flag, of Honduras; that the seamen employed on the vessels were mostly Honduran nationals; and that Empresa hired the officers and crew and handled all matters pertaining to their terms and conditions of employment. The Board further found that Empresa was wholly owned by UFCO, which was an American corporation; that UFCO elects Empresa's directors; and that Empresa, with few exceptions, time charters all of its vessels[4] to UFCO, which, in turn, determines their voyages, ports of call, length of stay in various ports, and cargoes. Finally, the Board found that the vessels operate between Central and South American countries and the United States, carrying UFCO cargo on inbound and outbound voyages; that they regularly call at United States ports; and that Empresa vessels

[4] Under a "time" charter, the charterer provides not only the vessel, but also all officers and crewmen. This is to be distinguished from a "bareboat" charter, which covers only the vessel.

were used interchangeably by UFCO with other vessels—some under the American flag and some under foreign flags other than Honduran—which it owned and controlled, the vessels being assigned on the basis of availability, size and speed. (App. C, *infra*, pp. 62–66.)

The Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation * * *." The Board also held that "Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition." The Board further ruled that the maritime operations involved "possess those substantial United States contacts which, under our decision in *West India*, bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and other foreign aspects present;" and that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding." (App. C, *infra*, pp. 66–68.)

The Board ordered that an election be conducted among the employees of the UFCO-Empresa vessels

to determine whether they wished to be represented by the NMU, by Sindicato, or by no union (App. C, *infra*, pp. 69–70). Pursuant to the Board's direction, the Regional Director of the Second Region ordered that the election commence on December 17, 1961 (App. B, *infra*, p. 23).[5]

B. THE PRESENT SUIT

On December 12, 1961, respondent Empresa filed this suit against the Board's Regional Director, in the District Court for the Southern District of New York, to enjoin the scheduled election.[5a] Empresa alleged that the Board's assertion of jurisdiction over the vessels violated its constitutional rights, principles of international law, and Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927. In opposition to Empresa's motion for a temporary injunction, the Regional Director moved to dismiss the complaint, on the grounds that the district court lacked jurisdiction over an employer's suit to enjoin a representation election, that the request for relief was premature, that the members of the Board were indispensable parties defendant, and that, in any event, the Board's action was proper (App. B, *infra*, p. 23). On December 16, 1961, the district court (Judge Palmieri), after hearing, denied a temporary injunction. The court held that, although the alle-

[5] On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port. On vessels not scheduled to arrive during that period, the election was to be conducted by mail. (App. B, *infra*, p. 51.)

[5a] The National Maritime Union intervened in the suit as a party defendant.

gation that the treaty had been violated raised a sufficiently substantial constitutional question to give it jurisdiction to review the Board's Direction of Election, under *Vay* v. *Douds*, 172 F. 2d 720 (C.A. 2),[6] the mere holding of the election, pending a final determination of the legal issue, would not result in irreparable damage to Empresa (App. B, *infra*, pp. 50–57).

On January 12, 1962, the court of appeals reversed, and ruled that a temporary injunction should issue.[7] It held that, although the words of Sections 2(6), 2(7) and 9(c) of the Act literally cover this case,[8] the words should not be "stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage" (App. B, *infra*, p. 37). The court quoted (App. B, *infra*, p. 38) this Court's statements in *Lauritzen* v. *Larsen*, 345 U.S. 571, 584–585, that under maritime law the law of the flag is of "cardinal importance," and that

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[6] In that case, the Second Circuit (per Learned Hand, J.) had held that, although the district court generally was without jurisdiction to review Board action in a representation proceeding at the suit of an aggrieved union, an exception existed where a substantial constitutional question was presented. See also, *Leedom* v. *Kyne*, 358 U.S. 184, extending that principle to a situation where the Board action violates a plain statutory requirement.

[7] On December 20, 1961, after the argument of the appeal, the court stayed the election pending its decision.

[8] Section 9(c) directs the Board upon finding, after a hearing upon a petition, "that a question of representation affecting commerce exists," to direct an election by secret ballot and to certify the result thereof. "Commerce" is defined by Section 2(6) to include trade "between any foreign country and any State"; affecting commerce" is defined in Section 2(7) as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

the weight to be given the flag "overbears most other connecting events in determining applicable law." The court stated (*ibid.*) that "[h]ow 'cardinal' the importance is and how much 'weight' should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied * * *."

The court concluded that the National Labor Relations Act does not apply to the vessels involved in this case.[9] It stated (App. B, *infra*, p. 43) that to apply the Act "would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which * * * are still Honduras' 'primary concern' "; and that Empresa's case "goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Hon-

[9] The court stated (App. B, *infra*, pp. 48–49) that, "[i]n order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say."

duran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests."

REASONS FOR GRANTING THE WRIT

1. This case presents the same basic issue which is involved in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 469, this Term, certiorari granted, December 4, 1961, 368 U.S. 924, *i.e.*, whether, and to what extent, the National Labor Relations Act may be applied to vessels flying foreign flags which are substantially engaged in the commerce of this nation.[10] In *Incres*, the Court of Appeals for New York held that the Act "arguably" applied to a labor dispute arising out of an attempt by an American union to organize the crews of two vessels owned by Italian interests and flying the flag of Liberia, but operating as cruise ships for American tourists between New York and the Caribbean; and that the State courts therefore had no jurisdiction to enjoin the union's picketing of such vessels. 10 N.Y. 2d 218, 176 N.E. 2d 719. In so holding, the New York court relied on the *West India* and related cases (note 3, *supra*, p. 3) in which the Board had taken jurisdiction over foreign flag ships—the same cases which formed the basis for the Board's exercise of jurisdiction in the present case.

[10] In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, the Court held that the Act did not apply to a vessel, owned by a foreign corporation, sailing under a foreign flag, and manned by a foreign crew. But there, unlike here and in *Incres*, the vessel's only contact with the United States was that it "happened temporarily to be in American waters." See *Marine Cooks* v. *Panama S.S. Co.*, 362 U.S. 365, 369.

Although the court below stated that it was deciding only the particular case before it (see note 9, *supra*, p. 8), its holding that the various contacts between Empresa and the United States were not sufficient to give the Board jurisdiction casts doubt upon those earlier Board decisions and, consequently, upon the New York Court of Appeals decision in *Incres*. And in at least one respect the foreign flag ships involved in the present case have more substantial ties with the United States than the vessels involved in *Incres*. For in the latter case, the vessels are owned by Italian interests, whereas in the present case the vessels, although owned by a Honduran corporation, are operated as part of the business of that company's American parent, UFCO.

The Board decides whether it has jurisdiction over foreign flag vessels operating in the commerce of the United States on the basis of the contacts which the particular vessels have with the United States. In determining the scope of the Board's jurisdiction in this area, the Court should find it helpful to have before it some of the other factual contexts in which the issue has arisen. It is therefore appropriate for the Court to grant the petition in this case, and to set the case for hearing together with *Incres*.[11]

[11] While the present suit by Empresa was pending, another suit to enjoin the same election was brought in the District Court for the District of Columbia by Sociedad, the Honduran union which currently represents the seamen on the vessels. On January 18, 1962, the District Court for the District of Columbia likewise held that the election should be enjoined, on the broad ground that the Board lacks power to apply the Act to vessels flying the flags of other nations. *Sociedad Nacional* v. *McCulloch, et al.*, Civil Action 4020–61 (D.D.C.), 49 LRRM 2434. On March 6, 1962, a final judgment was entered

2. Prompt and definitive guidance upon the applicability of the National Labor Relations Act to employment upon foreign flag vessels is a matter of great urgency to the Executive Branch of the government as well as to the National Labor Relations Board.

The question presented is an important and recurring problem in the administration of the Act.[11] Employment conditions upon foreign flag vessels have been a matter of vital concern to maritime unions in the United States because of their competitive effect,[12] and this problem, coupled with union activities upon foreign flag vessels, has given rise to considerable unrest in maritime labor relations. Uncertainty concerning the governing jurisdictional principles is one contributing factor.

The Board's holding that the Act applies to these Honduran vessels is of grave concern to the Department of State because it raises delicate questions concerning

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in that case, and the Board thereafter noted an appeal to the United States Court of Appeals for the District of Columbia. As soon as the record is docketed in that court, the Board intends to file a petition for certiorari in advance of judgment by the court of appeals.

[12] In addition to the instant case, the Board has taken jurisdiction in five other cases involving foreign flag ships. *West India Fruit and Steamship Co.*, 130 NLRB 343, an unfair labor practice case, pending on the company's petition to review, in the Fifth Circuit; *Peninsular and Occidental S.S. Co.*, 132 N.L.R.B. No. 1, also an unfair labor practice case, pending on the Board's petition for enforcement, in the Fifth Circuit; *Eastern Shipping Corp.*, 132 NLRB No. 72, *Hamilton Bros., Inc.*, 133 NLRB No. 85, and *Owens-Illinois Glass Company*, 136 NLRB No. 32, all representation cases. See also, *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625, certiorari denied, 366 U.S. 905.

[11] Employment on American flag ships has steadily declined since 1945. See *The Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 502–503 (1960).

our obligations under treaties and other problems in foreign relations, some of which have already been the subject of representations by the Honduran government.

The Department of Defense deems the availability of the fleet of foreign flag vessels in the case of war or national emergency to be essential to the national defense; as a practical matter the ownership and status of these ships are likely to be affected not only by the resolution of the ultimate issue but, quite possibly, by continued uncertainty.

As long as the basic question is in debate the interested parties, both governmental and private, will find it difficult, and often impossible, to formulate long-range plans and programs vitally affecting maritime labor relations, international relations and the national defense. In these circumstances a definitive determination by this Court of the scope of the Board's jurisdiction over foreign flag carriers operating in foreign commerce between the United States and other nations is urgently required.

CONCLUSION

The Solicitor General is not presently able to advise the Court of the position of the United States upon the merits. The United States will formulate its position before argument on the merits and also expects to file a brief *amicus curiae* in the *Incres* case. The National Labor Relations Board believes that it properly asserted jurisdiction in the present case and that the decision below should be reversed. The Solicitor General on behalf of the United States unqualifiedly joins in the representations concerning the importance of the case and the need for a decision by this Court.

The petition for a writ of certiorari should be granted and the case should be set down for argument together with the *Incres Steamship Company, Ltd.*, v. *International Maritime Workers Union*, No. 469, this Term, certiorari granted, 368 U.S. 924.[14]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

APRIL 1962.

[14] While we disagree with the holding of the court of appeals (App. B, *infra*, pp. 29–34) that the district court had jurisdiction, at the suit of an employer, to enjoin the Board from conducting an election, we do not believe that this Court will have to reach the question. As noted (note 11, *supra*, p. 10), the District Court for the District of Columbia, in a suit brought by a union, has recently enjoined the Board from conducting the same election. The Board intends to file a petition for a writ of certiorari before judgment by the court of appeals in that case. The Board does not contest the right of a union (as distinguished from an employer), in the very peculiar circumstances here involved, to maintain an action in the district court challenging a Board of a representation proceeding. If this Court grants the petition to be filed in the District of Columbia case, it can there decide all the substantive issues raised in the present petition, without having to reach the jurisdictional question, and its decision there will settle the basic controversy in the case. We refer to the jurisdictional issue primarily to reserve the right to argue it if the Court should deny the petition in the District of Columbia case.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 946, 29 U.S.C. 151, *et seq.*) are as follows:

SECTION 1. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute bur-

dening or obstructing commerce or the free flow of commerce.

* * * * * *

SEC. 9 * * *

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts busi-

ness, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in

part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact in supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on

the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * *

U.S. Code—Title 28:

SECTION 1331. *Federal question; Amount in controversy; costs.*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * * * *

SECTION 1337. *Commerce and anti-trust regulations.*

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 233—September Term, 1961

Argued December 20, 1961—Decided January 12, 1962

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A. PLAINTIFF-APPELLANT

v.

*IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, DEFENDANT-APPELLEE

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, INTERVENOR-APPELLEE

Before LUMBARD, *Chief Judge,* FRIENDLY and MARSHALL, *Circuit Judges.*

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. **Reversed.**

ORISON S. MARDEN, (*White & Case*), *New York, New York (Chester Bordeau and William D. Conwell, of Counsel), for Plaintiff-Appellant.*

*2-RC-10379.

ALLEN I. MENDELSOHN,
(Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C., and Samuel M. Kaynard, Regional Attorney, New York, New York), for Defendant-Appellee.

HERMAN E. COOPER,
New York, New York, for Intervenor-Appellee.

ALFRED A. GIARDINO,
New York, New York, for United Fruit Company.

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and

South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL–CIO, by Sindicato Maritimo Nacional de Honduras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran;

[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

National Maritime Union fails on both counts. Defendant has informed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and the principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce.

[2] This states:

"Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and "There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense, was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the steamship companies or the position of the unions" (p. 2), it advanced (pp. 15–20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion, filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights, see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961,

the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an intrusion by the United States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

I. THE JURISDICTION OF THE DISTRICT COURT

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U.S.C. §§ 1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934).

As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

come within § 1331, whether or not the claim was meritorious; the difficulty with respect to § 1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under § 1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction," *KVOS, Inc.* v. *Associated Press, supra*, at 277.

Moreover, we think the complaint asserted a claim under § 1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce * * *," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946); *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it.

But § 1337, like § 1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce; it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.*, 241 U.S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.*, 253 U.S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950), whereas here, as in *Smith*, it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal courts.[5]

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[5] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal question statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if

(2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

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jurisdiction under 28 U.S.C. § 1331 fails for lack of the required amount, the action would come within 28 U.S.C. § 1346 (a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether § 1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U.S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956), the argument would fail on the basis that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters arising under the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1948). *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), could serve here as a special statutory provision such as Professor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that District Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D.C. Cir. 1957), aff'd 358 U.S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D.C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§ 109 and 110; cf. *Asakura* v. *Seattle*, 265 U.S. 332 (1924) and 28 U.S.C. § 1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U.S. 580, 597–600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U.S. 102, 119–120 (1933); *Whitney*

v. *Robertson*, 124 U.S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, § 128. Any benefit plaintiff takes from the Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. *Leedom* v. *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *UNA Chapter, Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D.C. Cir. 1961), cert. denied, —— U.S. —— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U.S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191–196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such

an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom* v. *Norwich, Connecticut Printing Specialties and Paper Products Union*, 275 F. 2d 628 (D.C. Cir.), cert. denied, 362 U.S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

[7] The Supreme Court has already granted certiorari, —— U.S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21 (1961).

Assuming that the principle of *Leedom v. Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in § 9(d) of the Act, on enforcement or review proceedings under § 10(f). The second is that, unlike *Leedom v. Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958, reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447–448.

An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219–220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom v. Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was NMU, Sindimar, or "no-union," plaintiff would suffer by being obliged to breach its contract with Marineros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the

best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director* that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U.S.C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauffler*, 80 F. Supp. 400 (E. D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Donds*, 80 F. Supp. 402 (S.D. N.Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S.D. N.Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U.S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning*, *supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order

* The Board's order of November 15 provided: "The Regional Director * * * shall direct and supervise the election": the supplemental order of December 5 provided "for the conduct of the election at the discretion of the Regional Director."

of the Postmaster General. The rule there stated, 332 U.S. at 493–494, is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the the Board is not required to have an election conducted by the regional director, citing § 102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not, see 3 Davis, Administrative Law Treatise (1958), pp. 602–603. For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 53 (1955). Significant also, and quite applicable here, is the

Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

M. THE POWER OF THE BOARD TO DIRECT AN ELECTION

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll v. Associated Musicians*, 295 F. 2d 484, 488–489 (2 Cir. 1961), and cases cited.

The defendant's position proceeds from the basis that § 9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is defined by § 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that § 2(6) defines commerce to include "trade, traffic, commerce, transportation or communication * * * between any foreign country and any State, Territory, or the

[9] See Notes, William v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

District of Columbia." Literally the words cover the case. Yet the Board would hardly insist that the words apply to everything within their literal reach: we have not heard it suggested that the Board considers its power extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objectioning to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage. *Lauritzen v. Larsen*, 345 U.S. 571, 577–579, 581–582 (1953); as was said in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949).

The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran registered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed

long ago, *Wildenhus' Case*, 120 U.S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U.S. 100, 123–124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U.S. at 584–585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger than an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U.S. 354, 383–384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U.S. 642 (1932), this court applied the Jones Act to the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U.S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U.S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more directly relevant to our problem. A provision of the Seaman's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U.S.C. § 599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U.S. 185, 194, 195 (1918), see also *Jackson* v. *S.S. Archimedes*, 275 U.S. 463 (1928). On the other hand, the 1920 amendment of § 4 of the Seamen's Act, 41 Stat. 1006, 46 U.S.C. § 597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement." *Strathearn SS. Co.* v. *Dillon*, 252 U.S. 348 (1902).[10]

It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned * * *" 252 U.S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573–574 (2 Cir.), cert. denied, 364 U.S. 915 (1960).

It involved the SS. Riviera, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the Riviera was in Portland, Oregon, loading a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The shipowner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor Management Relations Act had preempted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U.S. at 143:

> Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees.

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions * * * have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of § 303(a) (1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under § 303 (b) to get protection from any unfair labor practice

condemned by the Act"; hence Congress had occupied the field, 353 U.S. at 147–150. The only subsequent Supreme Court decision in this area is *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co. v. Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon law.

The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, —— U.S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U.S. at 142, and upon the reference to "temporarily" in *Marine Cooks*. As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§ 7, 8, 9 and 10, but only the provisions of § 303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would be, or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other

[11] However, the Court may have thought that the liabilities imposed on unions by § 303 and the rights conferred by §§ 7, 8, 9 and 10 must be regarded as a single package, see Note, *The*

hand, application of §§ 7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 336 U.S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U.S. at 575–576 and in *Romero*, 358 U.S. at 358, show, imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in

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Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L.J. 498, 518–519 (1960).

the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U.S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646–647 (2 Cir.), cert. denied, 352 U.S. 871 (1956). The situation here differs sharply from the United States informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr S.S. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.*, v. *Federal Maritime Board*, 295

[12] See the discussion in 69 Yale L.J. 498, 514–515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros "is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

F. 2d 147, 153 (D.C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction," 345 U.S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act by such provisions as § 10(1) and § 303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1, of the Convention reads:

> Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the text nor such explanatory materials as we have found say specifically what happens if the conditions of the final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligations of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the

[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

first clause, particularly in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v. *National Marine Engineers Beneficial Assn.*, 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but also to have anticipated cases

[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed

where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U.S. at 147, seems exceedingly apposite:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculties necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag

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cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219–220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problem of the Courts, 60 Colum. L. Rev. 714, fn. 1 (1960). It has continued for economic reasons. See Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L. J. 498 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the deadweight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 40%, of the United States flag tonnage.

[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy, N.Y. Times, Sept. 20, 1961, p. 47, col. 6.

are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases, *Navios Corp* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U.S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21, cert. granted, —— U.S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

Civ No. 228

Opin 180

United States District Court, Southern District of New York

61 Civil 4413

EMPRESA HONDURENA DE VAPORES, S.A., PLAINTIFF

against

*IVAN C. MCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, DEFENDANT

PALMIERI, J.

This is a motion [1] for a preliminary injunction restraining defendant [2] from carrying out an order of

*2-RC-10379.

[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable

the National Labor Relations Board (Board) directing a representation election among the unlicensed seamen employees of Empresa Hondurena de Vapores, S.A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owned subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since the formation of Empresa it has, with a few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded

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parties to the action, are questions unnecessary to determine, in view of what follows.

[3] This Union did not permit its name to be placed on the ballot. Another Honduran union, Sindicato Maritimo Nacional de Honduras, "Sindimar," the National Maritime Union of America, AFL-CIO, and "no union," are the three choices offered by the proposed ballot.

its powers under the Labor Management Relations Act of 1947, 29 U.S.C. Chapter 7, inasmuch as this Act has been held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question: that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

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[4] *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); cf. *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365 (1960); *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis* v. *Compania Panamena Maritima San Gerasimo*, 168 F. Supp. 236, 238 (1958).

[5] Article VI of the Constitution provides, in pertinent part, as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; * * *" Assuming there is a conflict between the Board's action, properly exercised pursuant to the Labor Management Relations Act of 1947, and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 598–599 (1884); *Taylor* v. *Morton*, 23 Fed. Cas. No. 13,799 (1855); cf. *Cook* v *United States*, 288 U.S. 102 (1933).

THE JURISDICTION OF THIS COURT TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFF

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the subject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.* The plaintiff, on the other hand, relies on the frequently cited and much discussed decisions in *Leedom v. Kyne*, 358 U.S. 184 (1958); and *Fay v. Douds*, 172 F. 2d 270 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided, that a restriction of the scope and method of review of labor determinations tended to achieve this result, and that such restriction tended to promote the efficient func-

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*49 Stat. 454 (1935) as amended, 29 U.S.C. § 160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals wherein the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in § 9(d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

tioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions—those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129–130 (2d Cir. 1960):

> Subsequently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial of constitutional rights, in that case lack of procedural due process, which is "not transparently frivolous." Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U.S. App. D.C. 398, 249 F. 2d 490, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of § 9, there § 9(b)(1).

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[7] See the Legislative History of the Labor Management Relations Act, 1947, (G.P.O. 1948); *Leedom* v. *Kyne*, 358 U.S. 185, 191–194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 405–411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 476*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D.C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D.C. Cir. 1959). *Arb. denied*, 359 U.S. 1011 (1959).

Since there is no claim here of the Board's violation of any statutory mandate, the *Lee dom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as amicus. At page 11 of his brief he stated:

> A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance.

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign rela-

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds*, 172 F. 2d 720, 723 (2d Cir. 1949):

"If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction, and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

tions considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

> The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of those countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements.

I cannot go as far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude therefor that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

THE PLAINTIFF'S ENTITLEMENT TO INJUNCTIVE RELIEF

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affecting the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions in this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, that the Attorney General believes that

resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and it is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

Dated New York, N.Y., December 16, 1961.

EDMUND L. PALMIERI,
U.S.D.J.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-10379

UNITED FRUIT COMPANY AND NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case,[1] the Board finds:

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Hon-

[1] On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company Inc.*, 130 NLRB No. 46, *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72, on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Nacional De Marineros Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation

duran flag vessels which it alleges are beneficially owned and controlled by the United Fruit Company, here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S.A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen of foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' argument based upon the flag law and other international law doctrine and upon certain treaties and conventions between the

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and appeared by counsel at the hearing. See, *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India* case, *supra*, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Shipping*[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this nation is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board

[3] The treaty and consular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19–21.

[4] 132 NLRB No. 1, at 5.

[5] 132 NLRB No. 72, at 5–6.

[6] See, *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); also, *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen*, *supra*.

has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts bewteen the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States.[9] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially an adjunct of a domestic corporation's operations in the international trade of the United States, and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere

[8] E.g., *West India*, *supra*, p. 15; *Eastern Shipping Corporation*, *supra*, at 2.

[9] *West India*, supra, 15; *Eastern Shipping Corporation*, supra, p. 6.

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U.S. contacts present were not just the result of the foreign seaborne trade of a truly foreign venture.

or across the seas, the controlling criteria are the same.

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent company. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact han-

dled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras. However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceeds $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its formation its business has been limited with but a few possible exceptions [11] to

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself

chartering its vessels to UFCO, and the seventeen ships under its control at the time of the hearing and which are the subject of the petition [12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships [13] and for provisioning them,[14] except for fuel, but also for hiring the officers and crews [15] and han-

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had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

dling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used, for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U.S. subsidiaries or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

[17] Some, if not all, of the ships also carry passengers.

UFCO's Marine Division, and the two groups of vessels are used interchangeably, carrying the same types of cargoes and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's

[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the

maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in *West India*,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present.[21] Ac-

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foreign flag vessels to be other than its own or to be otherwise than completely under its control.

[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empresa has, as noted, authority over such matters. Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pp. 14–15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

cordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2 (6) and (7) of the Act.[23]

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[22] Following the close of the hearing in this case, Sindicato Maritimo Nacional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No. 85.

Sociedad Nacional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Nacional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Nacional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Nacional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Nacional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa, that its contract with Sociedad Nacional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective.

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S.A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees, who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and

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because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e., that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by National Maritime Union of America, AFL–CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar"; or by neither.

Dated, Washington, D.C.

[SEAL] FRANK W. MCCULLOCH,
Chairman,

BOYD LEEDOM,
Member,

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,
National Labor Relations Board.

PHILIP RAY RODGERS, *Member,* dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company,* 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated, Washington, D.C.

PHILIP RAY RODGERS,
Member,
National Labor Relations Board.

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